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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on minority issues, Rita Izsák, in accordance with Assembly resolution 68/172.

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Report of the Special Rapporteur on minority issues

Summary

The present report addresses the human rights of persons belonging to national or ethnic, religious and linguistic minorities in relation to the various stages of the criminal justice process, extending from before arrest through the execution of sentence. The report considers obstacles to access to justice confronted by minority victims of crime. It highlights the need to ensure the effective participation of minorities in the administration of justice.

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I. Introduction

1. The present report of the Special Rapporteur on minority issues is submitted to the General Assembly at its seventieth session in accordance with Assembly resolution 68/172 and Human Rights Council resolution 25/5.

2. Section II of this report provides a brief overview of the activities of the Special Rapporteur since the issuance of her previous report to the General Assembly (A/69/266) and section III focuses on minorities in the criminal justice system. The final section presents conclusions and offers recommendations in this regard.

II. Activities of the Special Rapporteur on minority issues

A. Country visits

3. A summary of the recent activities of the Special Rapporteur — including her country missions, to Nigeria, conducted from 17 to 28 February 2014 (see A/HRC/28/64/Add.2), and Ukraine, from 7 to 14 April 2014 (see A/HRC/28/64/Add.1) — can be found in her annual report to the Human Rights Council (A/HRC/28/64).

B. Global study on Roma

4. The Special Rapporteur carried out a comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism, at the invitation of the Human Rights Council (see resolution 26/4). Adopting a consultative approach, she liaised with international and regional organizations, Roma rights experts and non-governmental organizations. Her report on the results of the global study (A/HRC/29/24) was presented to the Human Rights Council at its twenty-ninth session, held in June 2015.

C. Forum on Minority Issues

5. The Special Rapporteur has been requested by the Human Rights Council in its resolutions 6/15 and 19/23 to guide the work of the Forum on Minority Issues. The seventh session of the Forum, which was held on 25 and 26 November 2014, focused on protecting minorities from violence and atrocity crimes, and identifying challenges involving minorities, as well as solutions and effective practices for preventing and addressing violence.[1] The approximately 600 participants included representatives of Governments, minority communities, specialized agencies, regional organizations, national human rights institutions and civil society.

6. The eighth session of the Forum, on the theme of minorities in the criminal justice system, which is to be held on 24 and 25 November 2015,[2] will prioritize identifying positive and effective practices for protecting and promoting minority

[1] The recommendations of the Forum at its seventh session are contained in document A/HRC/28/77.

[2] See http://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/Session8.aspx.

rights in the various stages of the criminal justice process, including in law enforcement operations, the judiciary and the legal profession. This report will contribute to and inform the discussions held.

III. Minorities and the criminal justice process

A. Introduction

7. The Special Rapporteur is alarmed by the many allegations that she has received of human rights violations committed against minorities in the administration of criminal justice, owing to their minority status. Having reviewed existing United Nations documentation[3] and relevant documents from regional and national institutions, through her consultations with Governments (see annex), various experts and civil society, the Special Rapporteur has identified global patterns of violations of the rights of minorities in the criminal justice process.

8. The Special Rapporteur recalls the four pillars of minority rights elaborated in prior reports, which provide an important framework for understanding minority rights within the criminal justice system (see A/HRC/29/24, para. 17). She also recognizes the variety in legal systems around the world. While the modality of violations of rights of minorities may vary among systems, no system is free of such concerns. National specificities in the administration of criminal justice, however, can never justify discrimination in the administration of justice (see E/CN.4/Sub.2/2005/7, paras. 31-41).

9. This report highlights some examples of good practices. However, too often a lack of data collection precludes Governments from accurately assessing the existence and scale of violations, or designing effective countermeasures. It should be noted, however, that the report is not exhaustive, and does not address violations by law enforcement officials outside of the formal criminal justice process, or violations arising from substantive criminal law, which impact minorities and merit further research.

B. Legal framework

10. International law protects persons in contact with the criminal justice system who belong to national or ethnic, religious and linguistic minorities. It prohibits discrimination in the administration of justice and creates positive obligations to ensure that justice systems are sensitive to, and facilitate effective participation of, minorities. These overarching principles are developed through treaty law and customary international human rights law and, in situations of armed conflict, international humanitarian law.[4]

11. The overarching principle of non-discrimination including, specifically, equality before the law and before the courts, is enshrined in, for example, the

[3] See also E/CN4/Sub.2/1982/7, E/CN.4/Sub.2/2003/3, E/CN.4/Sub.2/2005/7.

[4] Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention, 1949), articles 3 (1) (d), 27, and 71; 1977 Protocol I, article 75 (1), (3) and (4); 1977 Protocol II, articles 2(1) and 6; and International Committee of the Red Cross study of customary international humanitarian law (2006), rules 88, 90, 99, 100, 102, 103 and 104.

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter referred to as the Minorities Declaration), the Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination.[5] These are reinforced by regional instruments such as the African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter) (articles 2 and 3), the Arab Charter on Human Rights (hereinafter referred to as the Arab Charter) (articles 3 and 11), the Framework Convention for the Protection of National Minorities (Council of Europe) (article 4)) and the American Convention on Human Rights (hereinafter referred to as the American Convention) (articles 1 and 24), as well as by the Inter-American Convention against All Forms of Discrimination and Intolerance (not yet in force) jurisprudence and international humanitarian law.[6] The concept of effective participation is recognized in the Minorities Declaration (article 2), under the International Covenant on Civil and Political Rights[7] and in regional standards.[8]

12. Fairness and effective safeguards for rights at all stages of the criminal justice process depend on the ability of suspects, defendants, victims and witnesses to understand what is happening. In this regard, the rights of linguistic minorities provided for by the Minorities Declaration, the International Covenant on Civil and Political Rights (articles 27 and 14), the Universal Declaration of Linguistic Rights (associated with the United Nations Educational, Scientific and Cultural Organization (UNESCO)), the Framework Convention for the Protection of National Minorities (article 10 (3)), the Arab Charter (article 25), and international humanitarian law and other instruments, take on particular importance.

13. The right to liberty and security of person,[9] prohibition of torture and other ill treatment,[10] right to a fair trial,[11] right to privacy,[12] and right to life[13] are relevant to surveillance, stop and search, use of force, arrest, questioning, pretrial detention,

[5] Universal Declaration of Human Rights, articles 1, 7 and 10; International Covenant on Civil and Political Rights, articles 2, 14 and 26; Minorities Declaration, articles 2, 3 and 4; Convention on the Rights of the Child, article 30; and International Convention on the Elimination of All Forms of Racial Discrimination, articles 1, 2 and 5.

[6] Framework Convention for the Protection of National Minorities, article 14, and European Union Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, preambular para. 9; and International Committee of the Red Cross study of customary international humanitarian law (2005), rule 88.

[7] Human Rights Committee, General Comment 23 (article 27).

[8] Organization for Security and Cooperation in Europe (OSCE) Lund Recommendations on the effective participation of national minorities in public life (1999). See also Arab Charter, articles 24 and 25; American Convention, article 23; African Charter, article 13; and Human Rights Committee, General Comment 23 (article 27).

[9] UDHR, articles 3 and 9; ICCPR, article 9; and ICERD, article 5 (a) and (b).

[10] UDHR, article 5; ICCPR, article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and ICERD, article 5 (b).

[11] UDHR, article 10; ICCPR, article 14; and ICERD, article 5 (a).

[12] UDHR, article 12; and ICCPR, article 17.

[13] UDHR, article 3; ICCPR, article 6; and ICERD, article 5 (b).

criminal trial and sentencing. Additional United Nations and regional instruments address these issues in greater detail.[14]

14. For minority victims of crime, standards on the right to effective remedy and reparation, and to participation and protection in the criminal justice process, are relevant.[15]

15. Human rights standards also affirm that members of minorities must have equal access to training and service as law enforcement officials, including within the police, prosecution, judiciary and legal profession.[16]

16. The Organization for Security and Cooperation in Europe (OSCE) Recommendations on Policing in Multi-Ethnic Societies (2006) are of cross-cutting importance, providing guidance on representativeness of police and enhancing communication between police and minority communities.[17]

17. General Recommendation XXXI of the Committee on the Elimination of Racial Discrimination on the prevention of racial discrimination in the administration and functioning of the criminal justice system describes measures for gauging and preventing discrimination at each stage of the criminal justice system. Committee on the Elimination of Racial Discrimination recommendations can and should be extended and adapted to cover discrimination against all national or ethnic, religious and linguistic minorities.

C. Minorities and the exercise of police powers

18. Should a disproportionate number of individuals from a minority group find themselves in contact with the police as a result of discrimination, then even if, formally, every other step of the process functions impartially, minorities will, similarly, be disproportionately represented throughout that process. This underscores the importance of strict non-discrimination at the policing stage. The

[14] See, e.g., Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rules 6, 41, 42 and 51; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 5 and 14; Code of Conduct for Law Enforcement Officials, articles 2 and 3; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Basic Principles on the Independence of the Judiciary, articles 2 and 6; Basic Principles on the Role of Lawyers, articles 2 to 8; Guidelines on the Role of Prosecutors, articles 2 (b), 12 and 13 (a); African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and PreTrial Detention in Africa (Luanda Guidelines) (2014); and Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008).

[15] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, article 3; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 25; Guidelines on the Role of Prosecutors, articles 13 (b) and (d); and European Union Directive 2012/29 on victims of crime.

[16] Minorities Declaration, generally; ICCPR article 25 (c); Basic Principles on the Independence of the Judiciary, article 10; Basic Principles on the Role of Lawyers, articles 10 and 11; Guidelines on the Role of Prosecutors, article 2 (a); OSCE Lund Recommendation 6; Arab Charter, articles 24 and 25; American Convention, article 23; and African Charter, article 13.

[17] Available from http://www.osce.org/hcnm/32227. The Introduction affirms the relevance of the Recommendations to religious, linguistic and cultural minorities as well.

risk of discrimination further increases when police forces do not reflect the diversity within the population.[18]

19. Police often have wide-ranging discretionary powers. Some discretion may be necessary owing to the nature of their work. However, the broader the discretion, the greater the risk of its arbitrary or discriminatory exercise, particularly in the absence of effective independent oversight mechanisms.[19] Indeed, globally, and specifically in such areas as counter-terrorism legislation where police powers continue to expand beyond the reach of effective oversight mechanisms, minorities are increasingly at risk.

20. Furthermore, police practices that impact a certain minority excessively tend to reinforce the sentiment among the members of the group that they are not an integral part of society. This can ultimately undermine the efforts to protect and promote their identity, as they may seek to hide their status in order to avoid unwarranted attention.[20] Such practices can also contribute to the creation of a vicious circle of tension between the police and minority communities.

1. Identity check, stop and search, and surveillance

21. Although most countries affirm their opposition to racial profiling,[21] there are ongoing reports of disproportionate targeting by police of individuals for identity checks, stop and search, or other forms of coercive or privacy-invasive police powers, which are related purely to identity-based minority group characteristics rather than to any credible suspicion that the individual in question has been involved in illegal activity.[22]

[18] See the working paper of 28 June 2006 (E/CN.4/Sub.2AC.5/2006/WP.1) submitted by Tom Hadden, including the draft "toolkit on integration with diversity in security, policing and criminal justice"; OHCHR, report on the Expert Meeting on Integration with Diversity in Policing, Vienna, 15 and 16 January 2008 (A/HRC/10/38/Add.1), para. 55.

[19] E/CN.4/Sub.2/1982/7, paras. 2-39; and E/CN.4/Sub.2/2005/7, paras. 55-56.

[20] Special Rapporteur on counter-terrorism and human rights, A/HRC/4/26 (29 January 2007), paras. 56 to 58 (profiling based on ethnicity, national origin or religion).

[21] The majority of respondents to the questionnaire declared they prohibit the use of profiling based on minority status.

[22] See for example: CCPR/C/USA/CO/4 (HRC, 2014), para. 7; CAT/C/USA/CO/3-5 (Committee against Torture, 2014); CERD/C/CAN/CO19-20 (CERD, 2012); CERD/C/RUS/CO/20-22 (CERD, 2013); A/HRC/27/68 (Working Group of Experts on People of African Descent report on access to justice, 2014), para. 57; A/HRC/24/52/Add.1 (Working Group of Experts on People of African Descent mission to the United Kingdom, 2013); CERD/C/THA/CO/1-3 (CERD, 2012); A/HRC/24/52/Add.2 (WGPAD mission to Panama, 2013); CERD/C/UKR/CO/19-21 (CERD, 2011); CERD/C/ESP/CO/18-20 (CERD, 2011); CERD/C/SWE/CO/19-21 (CERD, 2013); CERD/C/AUT/CO/18-20 (CERD, 2012); A/HRC/21/60/Add.1 (WGPAD mission to Portugal, 2012); CERD/C/FIN/CO/20-22 (CERD, 2012); communication ESP 2/2015 received by the Special Rapporteur on minority issues; and United Kingdom Equality and Human Rights Commission, "Stop and think: a critical review of the use of stop and search powers in England and Wales" (2010).

22. The exercise of police powers on the basis of such racial or ethnic profiling has been held to violate international human rights law.[23] Increased general surveillance of members of a particular religious faith, solely on the basis that some believers have engaged in terrorist or other crimes, would raise similar concerns.[24]

23. Given that racial profiling often stems from embedded discrimination, it is not sufficient for States to simply refrain from formally endorsing such profiling methods; Governments should take proactive steps to prevent law enforcement officers from, as a matter of practice, engaging in such conduct.[25] Precautions can be taken to reduce disproportionate impact on minorities.[26] Indeed, avoidance of the profiling of ethnic or other minority characteristic may also improve crime detection rates, as police officers examine individual behaviour more closely.[27]

24. Public confidence and police effectiveness can be improved through the deployment of ethnically mixed patrol teams and a sensitive choice of tactics and appearance (in terms, e.g., of numbers, visibility of weapons and choice of uniform) so as to avert unnecessary provocation of fear or tension.[28] Police should be trained to understand the social context, cultural practices and values of the community. They should be capable of communicating with minorities in minority languages, wherever possible, through recruitment and training of multilingual staff, and also through the use of qualified interpreters.[29]

2. Use of force

25. United Nations human rights mechanisms are regularly informed of the subjection of minorities to excessive use of force by police, torture or other ill treatment in detention, and the lack of prompt and impartial investigations of such

[23] A/HRC/29/46 (Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on racial and ethnic profiling), para. 63; Human Rights Committee, *Williams Lecraft v. Spain*, communication No. 1493/2006 (2009), para. 7.2; European Court of Human Rights, *Timishev v. Russia* (2005); and *Gillan and Quinton v. UK* (2010), para. 85. See also Cour d'Appel de Paris Pôle 2, Chambre 1, Judgments 13/24255, 13/24261, 13/24262, 13/24277 and 13/24300 (24 June 2015); and Décision du Défenseur des droits MSP/MDS/MLD-2015-021 (3 February 2015).

[24] Report of the Special Rapporteur dated 29 January 2007 on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/4/26), paras. 32-62 and 83-89.

[25] CERD General Recommendation XXI (2005), para. 20.

[26] E.g., see United Kingdom Equality and Human Rights Commission, "Stop and think again: towards race equality in police PACE stop and search" (2013); OSCE Recommendation 16 on Policing in Multi-Ethnic Societies (2006); Open Society Foundations, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices* (New York, 2012), pp. 151-152.

[27] Open Society Justice Initiative, *Addressing Ethnic Profiling by Police* (New York, 2009), p. 29; and European Union Agency for Fundamental Rights, *Towards More Effective Policing: Understanding and Preventing Discriminatory Ethnic Profiling — A Guide* (Luxembourg, Publications Office of the European Union, 2010), p. 35.

[28] OSCE Recommendation 18 on Policing in Multi-Ethnic Societies (2006).

[29] OSCE Recommendation 13 on Policing in Multi-Ethnic Societies (2006).

cases.[30] A pattern of racially discriminatory treatment, including in the use of force, by law enforcement officers in the United States of America has recently triggered urgent discussion within the United States and beyond on how to bring such violations to an end.[31]

26. States must ensure full compliance with the requirements of proportionality and strict necessity in any use of force against persons belonging to ethnic, national and other minorities, with intentional use of lethal force being restricted to situations where it is strictly unavoidable to save life.[32] Victims, families and others who allege unlawful use of force must have access to impartial, independent and effective complaints mechanisms, and police officers involved must be held accountable, including criminally.[33]

27. The elevated risk and frequency of torture and other ill treatment of minorities has been widely reported and documented.[34] The Convention against Torture explicitly recognizes "discrimination of any kind" as among the purposes of torture. The Committee has emphasized States' positive obligations to take measures specifically designed to protect individuals and groups made vulnerable by discrimination or marginalization, including minorities.[35] States must ensure that minority victims receive effective redress through, for example: creating culturally sensitive collective reparations measures; providing, in rules of procedure and evidence, that testimony from minorities must be given equal weight and discriminatory evidence excluded; and establishing units of police officers specifically trained to respond to cases of violence against ethnic, national, religious and other minorities.[36]

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[30] See, inter alia, CERD/C/BEL/CO/16-19 (CERD, 2014), para. 12; CAT/C/NOR/CO/6-7 (Committee against Torture, 2012); A/HRC/24/52/Add.2 (WGPAD mission to Panama, 2013); CERD/C/RUS/CO/20-22 (CERD, 2013); CCPR/C/TJK/CO/2 (Human Rights Committee, 2013); CAT/C/USA/CO/3-5 (Committee against Torture, 2014); CERD/C/MNE/CO/1 (CERD, 2009), CERD/C/GRC/CO/16-19 (CERD, 2009); and CAT/OP/KGZ/1 and Corr.1 (report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan, 2014), para. 23.

[31] See Investigation of the Ferguson Police Department, United States Department of Justice, Civil Rights Division, March 2015; Amnesty International USA, "Deadly force: police use of lethal force in the United States", June 2015, p. 7; CCPR/C/USA/CO/4 (Human Rights Committee, 2014), para. 11; and "Legitimate concerns over outcome of Michael Brown and Eric Garner cases: UN rights experts", OHCHR Press release, 5 December 2014.

[32] CERD General Recommendation No. 31 (2005), paras. 21-22; UN Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, paras. 5 and 9; report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions (A/66/330), 2011; and CCPR/C/USA/CO/4 (Human Rights Committee, 2014), para. 11.

[33] Basic Principles on the Use of Force and Firearms, paras. 7 and 23; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, paras. 1, 9 and 18.

[34] E.g., report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (A/64/215 and Corr.1) (3 August 2009), para. 40; fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/46/2) (2011), para. 107 (j); and CAT/C/52/2 (2014), paras. 80-82.

[35] Committee against Torture, General Comment 2(CAT/C/GC/2) (2008), paras. 20-24; and OSCE Recommendation on Policing 15.

[36] Committee against Torture, General Comment 3 (CAT/C/GC/3) (2012), paras. 8, 23, 29 and 32-35; and. OSCE Recommendation on Policing 15.

28. The Optional Protocol to the Convention against Torture requires, inter alia, the establishment of independent national preventive mechanisms empowered to carry out visits to all places of detention; the Protocol specifies that the mechanisms should include "adequate representation of ethnic and minority groups in the country".[37]

D. Representation of minorities in pretrial detention

29. Throughout the world, minorities tend to be overrepresented in pretrial detention.[38] Possible reasons for this tendency vary. For example, minorities are often disproportionately represented among poorer socioeconomic groups where patterns of offending may be higher in respect of certain crimes.[39] Particular provisions of substantive criminal law may have a discriminatory effect, for instance, when the practice of a minority religion may be interpreted as an offence against a majority religion.[40] Or, while the incidence of crime may be similar to that in the majority population, detection in minority communities may be higher owing to profiling practices by the police, or disproportionate targeting of minority communities, leading to higher rates of arrest.[41] Police and other authorities may show less leniency in relation to minor offences committed by minorities compared with other groups.

30. Minorities may face more frequent or longer periods of pretrial detention owing to: lack of access to a lawyer; lesser quality of the lawyers assigned to them; discriminatory attitudes shown by police and prosecutors,[42] judges or even the lawyers assigned to defend them; ill preparedness with respect to responding to criminal procedures owing to poverty, stigmatization or lack of knowledge; or

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[37] Optional Protocol to the Convention against Torture, article 18 (2) and fourth annual report of the Subcommittee on Prevention of Torture (CAT/C/46/2 (2011), para. 107 (j).

[38] See OSF, Presumption of Guilt (2014) pp. 49-50; PRI/APT Factsheet on Pre trial Detention (available from http://www.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf), accessed 18 May 2015. UN mechanisms observations: CCPR/C/USA/CO/4 (Human Rights Committee, 2014), para. 6; CERD/C/AUT/CO/18-20 (CERD, 2012), para. 13; CERD/C/BEL/CO/16-19 (CERD, 2014); A/HRC/19/53/Add.3 (WGAD visit to Germany, 2012), para. 63; CERD/C/NZL/CO/18-20 (CERD, 2013); A/HRC/27/68 (WGPAD report on access to justice, 2014), para. 57; A/HRC/24/52/Add.2 (WGPAD visit to Panama, 2013), paras. 62 and 63; E/CN.4/2006/7 (12 December 2005), paras. 65-67 and 84; Committee against Torture, CAT/C/FIN/CO/5-6 (2011); Luanda Guidelines, p. 10; and Inter-American Commission on Human Rights report on juvenile justice and human rights in the Americas (2011), para. 114.

[39] Michael Tonry, "Race, ethnicity, crime and immigration", in Sandra M. Bucerius and Michael Tonry eds., *The Oxford Handbook of Ethnicity, Crime and Immigration* (Oxford, Oxford University Press, 2014).

[40] Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran(A/HRC/25/61) (2014), paras. 35-43 (religious minorities).

[41] Working Group on Arbitrary Detention (WGAD), E/CN.4/2006/7 (12 December 2005), para. 65; Human Rights Watch, "Race, drugs and law enforcement in the United States", 19 June 2009; and A/HRC/24/52/Add.2 (WGPAD mission to Panama, 2013), para. 63. See also Open Society Justice Initiative, *Addressing Ethnic Profiling by Police*, 2009.

[42] E.g., CERD/C/KGZ/CO/5-7, para. 6 (CERD, Kyrgyzstan, regarding minority of Uzbek origin); and CAT/OP/KGZ/1 and Corr.1, para. 23 (report of the visit of the Subcommittee on Prevention of Torture, 2014).

socioeconomics-related inability to post bail or otherwise meet conditions for release.[43]

31. Linguistic minorities may be unable to read and understand legal documents, such as an appearance notice, and therefore become subject to an order for arrest and pretrial detention; they may not understand their right to counsel or appreciate that one is required; and they may have difficulty finding a legal representative who can speak their mother tongue.

32. Particularly in legal systems where police and prosecutors have greater discretion over pretrial detention, such detention may be deployed against minorities as a form of duress in order to punish, obtain confessions or make it easier to fabricate evidence.[44] Indeed, in some countries, the criminal justice system may at times contribute to the oppression of certain minorities.[45]

33. A person's minority status can never be a sufficient reason for pretrial detention.[46] The social, economic and cultural circumstances of minorities (e.g., with respect to bail, fixed address, employment and family ties) must be taken into account when setting financial or other conditions for release so as to prevent indirect discrimination.[47]

34. Judicial guarantees, as provided in article 9 of the International Covenant on Civil and Political Rights, must be fully respected with regard to any member of a minority group, including: the right to be informed in a language that he or she understands of the reason for arrest and any charges; the right to be promptly brought before a judge; the right to trial within a reasonable time; and the right to challenge the lawfulness of detention. Too often, the authorities are less diligent in respecting these guarantees when the person is a member of a minority.[48]

E. Rights in relation to judicial procedures and hearings

35. Minorities facing judicial proceedings may experience particular obstacles to realizing their rights to equality before the law, non-discrimination and a fair trial.[49]

36. To overcome these challenges, some States include distinct courts or procedures that incorporate aspects of the cultural, religious, linguistic or other

[43] E/CN.4/Sub.2/2005/7, para. 28; and report of the Working Group on Arbitrary Detention E/CN.4/2006/7) (12 December 2005), para. 66.

[44] E/CN.4/Sub.2/2005/7, para. 33, citing as examples reports of the Working Group on Arbitrary Detention on missions: to Latvia (E/CN.4/2005/6/Add.2), Belarus (E/CN.4/2005/6/Add.3) and China (E/CN.4/2005/6/Add.4).

[45] For example, see communications to the Islamic Republic of Iran (IRN 19/2012; 23/2013; 13/2014; and 22/2014), Turkey (TUR1/2012), Sudan (SDN 9/2008) and Kyrgyzstan (KGZ 1/2011).

[46] Human Rights Committee, General Comment 35 (2014) on article 9, paras. 17 and 38; A/HRC/19/57/Add.3 (Working group on Arbitrary Detention, Germany 2012); CERD General Recommendations 31 (2005), para. 26.(a); and Luanda Guideline 11 (a).

[47] CERD General Recommendation 31 (2005), para. 26 (b) and (c) and CERD/C/AUT/CO/18-20 (CERD, 2012), para. 13.

[48] Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, A/HRC/22/56 (28 February 2013), paras. 53-67; and A/69/356 (27 August 2014), para. 43.

[49] E.g., Special Rapporteur on Myanmar, A/HRC/25/64 (2014), para. 51.

characteristics of a particular minority.[50] In the Philippines, for instance, religious courts are provided in the Muslim Mindanao region.[51] Such culturally adapted courts must always ensure full compliance with international human rights standards, including guarantees for a fair public hearing by a competent, independent and impartial tribunal under the rule of law.[52]

37. Even in the absence of such courts, States should ensure that the cultural background of the accused, the victims and the witnesses is appropriately recognized, respected and accommodated by the authorities throughout criminal proceedings.

38. Where States have religious courts, they must ensure the rights of those not belonging to the same religion, through exercise of their right to choose whether they wish to be tried by a religious or a secular court, and the availability of appeals in all cases.[53]

1. Access and quality of legal aid

39. Access to legal assistance often determines whether a person can participate in court proceedings in a meaningful way. The right to a fair trial under international and regional standards includes the right to a lawyer, free of charge if necessary, wherever the interests of justice so requires, at all stages of the process, including in police custody and pretrial detention.[54]

40. Marginalization of minority groups means that they are more likely to rely on free legal aid. Failure by a State to ensure a system adequate in scope and resources particularly impacts minorities. Further, minorities are often unaware of the availability of legal aid or of how to access it, despite the obligation to provide such information.[55] Minorities may not receive equal access to or quality of legal aid, notwithstanding that international standards include an obligation of

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[50] United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), United Nations Children's Fund (UNICEF) and United Nations Development Programme (UNDP), "Informal justice systems: charting a course for human rights-based engagement" (2012), p. 140; and Jiunn-rong Yeh and Wen-Chen Chang, *Asian Courts in Context* (Cambridge, United Kingdom, Cambridge University Press, 2015), pp. 19-20.

[51] Philippines, Republic Act No. 9054 (31 March 2001), article VIII. Also, see below regarding linguistic minorities. Indigenous courts would be another related example.

[52] Human Rights Committee, General Comment No. 32, paras. 24 and 65. The Committee has also noted that jurisdiction of customary or religious courts should be "limited to minor civil and criminal matters" (para. 24).

[53] Human Rights Committee, General Comment No. 32, para. 24; report of the Special Rapporteur on minority issues (A/68/268), paras. 52-55; and communication BRN 1/201 on the discriminatory impact on women and religious minorities of Sharia Courts and Criminal Code.

[54] Human Rights Committee, General Comment 32, paras. 10, 32 to 34; ICCPR article 14 (3) (c); United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3; CERD General Recommendation 31 (2005) para. 30; Basic Principles on the Role of Lawyers, principles 5 to 8; ECtHR, *Salduz v. Turkey* (2008); Principles and Best Practices on Persons Deprived of Liberty in the Americas, principle V; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, parts G and H; and Luanda Guidelines 8 (a) and 8 d (iii).

[55] United Nations Principles and Guidelines on Access to Legal Aid, principle 8.

non-discrimination and recognize that special measures should be taken to ensure meaningful access for minorities.[56]

2. Linguistic minorities and the criminal process

41. Access to an interpreter is an essential fair trial guarantee for any person accused who does not understand the language in which the proceedings will be conducted.[57] This right, however, is not always fully implemented or respected in practice.[58]

42. A recent study of Sierra Leone underscores the importance of translation: of individuals interviewed in pretrial detention, 9 per cent did not understand English, the language typically used in the courts.[59]

43. From a minority rights perspective, every individual should also have the right, whether as accused or as witness, to use his or her native language in criminal proceedings, even if capable of communicating in a majority language.[60] This is important both for the protection and promotion of identity and to ensure effective and informed participation. In Slovenia, for instance, some municipalities with a significant concentration of Italian- and Hungarian-speaking minorities permit the use of these languages in court proceedings.[61]

44. It has been suggested that harsher sentencing can result from bias introduced by interpretation, because of cultural differences unintentional expression of the interpreter's preconceptions,[62] or negative perceptions of the accused's or the witness's credibility by the court or jury due to interpretation.[63] Caution must be exercised when using a non-certified translator or interpreter, and all interrogation and other records should specify the identity and status of any such person. If

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[56] United Nations Principles and Guidelines on Access to Legal Aid, principles 6 and 10; Basic Principles on the Role of Lawyers, principle 2; E/CN.4/Sub.2/2005/7, para. 24; A/62/18, para. 412 (CERD, Mozambique, 2007); CERD/C/HRV/CO/8 (CERD, Croatia, 2009); and A/HRC/27/48/Add.4 (Working Group on Arbitrary Detention, Visit to Hungary, 2014), para. 120.

[57] CERD General Recommendation 31 (2005), para. 30, and Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rule 55 (1).

[58] CERD/C/MAR/CO/17-18 (CERD, 2010); CERD/C/NO/CO/19-20 (CERD, 2011); CERD/C/ROU/CO/16-19 (CERD, 2010); CCPR/C/MKD/CO/2 (HRC, 2008); CCPR/C/CHN-MAC/CO/1 (Human Rights Committee, 2013); CERD/C/COL/CO/14 (CERD, 2009); CERD/C/FJI/CO/18-20 (CERD, 2012); CERD/C/IRN/CO-18-19 (CERD 2010); and CERD/C/CHL/CO/19-21 (CERD, 2013).

[59] Timap for Justice, Prison Watch Sierra Leone, UNDP and Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention in Sierra Leone* (New York, Open Society Foundation, 2013).

[60] E.g., article 20 of the UNESCO Universal Declaration of Linguistic Rights, adopted at the World Conference on Linguistic Rights (1996); OSCE Oslo Recommendations regarding the Linguistic Rights of National Minorities and Explanatory Note (1998), recommendations 17 and 18; and European Charter for Regional or Minority Languages (ETS No. 148) (1992), article 9 (1) (a) (ii).

[61] Antonija Petricusic, "Slovenian legislative system for minority protection", Noves SL. Revista de Sociolingüistica (autumn 2004). Available from http://www.gencat.cat/llengua/noves/noves/hm04tardor/docs/petricusic.pdf.

[62] D. J. Heller, "Language bias in the criminal justice system", 37 *Crim.L.Q* 344 (1995).

[63] Grabau and Gibbons, "The rights of linguistic minorities: challenges to court interpretation", 30 *New Eng. L. Rev.* 335 (1995-1996). Generally: C. S. Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer International Publishing, 2014).

translation is a minimum requirement in all cases, it is clear that it does not necessarily provide the fullest possible guarantee of fairness.

45. Numerous States go beyond these minimum provisions and provide for the right of certain linguistic minorities to have the proceedings themselves conducted in their own language. This may apply to the territory of the State as a whole or to a particular region. Wherever possible, such an approach is to be encouraged, as it contributes to the fairness of the proceeding, equality, promotion of identity and effective participation.[64]

3. Impartiality of judges and prosecutors, and representativeness of juries

46. The requirement of "impartial tribunal" as an aspect of the right to fair trial signifies that judges not only must be free from any actual prejudice but also must "appear to a reasonable observer to be impartial".[65] In assessing whether conduct by a judge vis-à-vis a minority individual violates this standard, one should consider specifically how members of the minority would perceive that conduct.

47. For instance, a judge in Canada excluded members of the public who wore a particular religious headdress from observing a criminal trial, citing a general rule against wearing hats in the court. The Court of Appeal commented that this ruling and the reasons pronounced by the judge "may well have inadvertently created the impression of an insensitivity as to the rights of minority groups" and therefore constituted an error that "may well have resulted in creating an atmosphere that undermined the appearance of a fair trial".[66]

48. States parties should strive firmly to ensure the absence of discriminatory prejudice against minorities on the part of judges, jury members and other judicial personnel. States should also prevent all direct influence by pressure groups, ideologies or religions on the functioning of the system of justice and on the decision of judges, which may have a discriminatory effect on certain groups.[67]

49. Judges should be aware of the diversity of society, and should act to counter any prejudice against minorities on the part of the persons under their direction or of lawyers appearing before them.[68] Numerous jurisdictions have published guidance, endorsed by chief justices and judicial councils and developed through inclusive

[64] E.g., Canadian Charter of Rights and Freedoms, article 19; sects. 530, 530.1 and 530.2 of the Criminal Code of Canada; OSCE, Oslo Recommendations regarding the Linguistic Rights of National Minorities and Explanatory Note (1998), recommendation 19; European Charter for Regional or Minority Languages (ETS No. 148 (1992), article 9 (1) (a) (i); Gulazat Tursun, "The protection of minorities in court proceedings: a perspective on bilingual justice in China", *Chinese Journal of International Law*, 9 (2010), pp. 537-563; and CERD/C/NIC/CO/14 (CERD, 2008), para. 19.

[65] Human Rights Committee, General Comment 32, para. 21.

[66] Ontario Court of Appeal, *R. v. Laws*, Judgment of 9 September 1998, paras. 26 and 28.

[67] CERD General Recommendation 31 (2005), paras. 31 and 32.

[68] See the Bangalore Principles of Judicial Conduct (Economic and Social Council resolution 2006/23, annex), value 5.

processes, to inform and sensitize the judiciary to the situation of minorities in order to prevent discrimination, whether explicit or implicit.[69] The Inter-American Court of Human Rights recently condemned the use of ethnic stereotypes and social prejudices in judges' reasoning.[70]

50. Prosecutors also must carry out their functions impartially and avoid any kind of discrimination against minorities.[71]

51. Independent professional bodies for judges, prosecutors and lawyers should ensure that codes of conduct prohibit discrimination against minorities, that complaints of discrimination are promptly and impartially investigated, and that disciplinary proceedings follow whenever complaints are well founded.[72]

52. Prospective jurors must not be excluded on the basis of their membership in a particular ethnic or national, religious or linguistic minority, whether directly, indirectly or by proxy. Any examination of potential religious prejudice in jury selection, for instance, should focus on the specific individual's beliefs (insofar as they are relevant to the case), and his or her capacity to set those beliefs aside, and not on stereotypic inferences drawn from his or her affiliation to a particular religious denomination. Before trial, the judge should alert jurors to the risk of implicit bias. Jurors who demonstrate bias against minorities should be disqualified.[73]

F. Sentencing

53. States must ensure that courts do not apply harsher punishments by reason of an accused person's membership in a minority.[74] Disparities in sentencing can arise through intentional prejudice or indirect discrimination. Minorities often face a greater likelihood of a prison sentence rather than conditional release, greater likelihood of longer terms of imprisonment or a sentence of life imprisonment without possibility of parole, and greater likelihood of imposition of the death

[69] E.g., Judicial College, England and Wales, Equal Treatment Bench Book (2013); and Australia (various jurisdictions), Equal Treatment Bench Books (2006, 2009). Many are updated frequently and publicly available online. See also John Richardson, *Bias in the Court! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions* (Williamsburg, Virginia, National Center for State Courts, 1997); Human Rights Council resolution 29/6 entitled, "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers", 2 July 2015, para. 6 and Kang and others, "Implicit bias in the courtroom", 59 *UCLA L. REV.* 1124 (2012), suggesting specific practices to counter implicit bias.

[70] Inter-American Court of Human Rights, *Norín Catrimán v. Chile* (29 May 2014).

[71] Guidelines on the Role of Prosecutors; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, part F.i(i).

[72] E.g., Supreme Court of Canada, *Moreau Bérubé v. New Brunswick* (Judicial Council), 2002 SCC 11.

[73] Human Rights Committee, General Comment 32, para. 25; CERD, *Narrainen v. Norway*, CERD/C/44/D/3/1991 (1994); European Court of Human Rights, *Sander v. the UK*, No. 34129/96 (2000); United States Supreme Court, *Batson v. Kentucky*, 476 US 79 (1986); Law Reform Commission reports on jury reform in, e.g., Australia, Canada, Ireland, New Zealand; and Kang (see footnote 69 above), pp. 1179-1186.

[74] CERD General Recommendation 31 (2005) para. 34.

penalty.[75] The issue of possible discrimination in later decisions about early release has been less studied but is no less relevant.

G. Conditions in pretrial detention and in prison

54. Minorities face discrimination in pretrial detention and in post-conviction imprisonment, whether because their treatment or conditions are poorer than those for other groups, or because authorities fail generally to respect standards that are especially important to the minority relating to: religious and cultural practices, customs as regards food, relations with families, and assistance of an interpreter, for example.[76]

55. Authorities must be aware of and respond to the risk of stigmatization or other discriminatory abuse on the part not only of prison staff, but of other inmates as well.[77]

56. International standards recognize that proactive measures designed to protect and promote the rights of prisoners with special needs are required.[78] As recognized by the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa, this requirement should be understood to include vulnerable minorities.[79] Such measures, including special programmes for minority women and children in custody, should be developed in consultation with the affected prisoners and minority communities.[80]

57. Failure to accommodate a convicted minority prisoner's particular needs may cause so much additional suffering, compared with that of non-minority prisoners in an equivalent position, as to render the punishment discriminatory and a violation of

[75] E.g., Human Rights Committee, CCPR/C/USA/CO/4 (2014), para. 6; CERD/C/ISR/CO/13 (CERD, Israel, 2007); A/HRC/11/2/Add.5 (report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 2009); CERD/C/PRT/CO/12-14 (CERD, 2012), para. 16; A/HRC/24/52/Add.1 (Human Rights Council, 2013); A/HRC/27/68 (WGPAD report on access to justice, 2014), para. 57; European Court of Human Rights, *Paraskeva Todorova v. Bulgaria*, No. 37193/07 (2010); United States Sentencing Commission, Life Sentence in the Federal System, February 2015, pp. 7 and 1 (available from http://clemencyreport.org/wp-content/uploads/2015/02/Federal-Life_Sentences-report-USSC.pdf); and global panel on discrimination and the death penalty, including a focus on minorities (New York, United Nations 2014) (available from http://webtv.un.org/meetings-events/watch/moving-away-from-the-death-penalty-%E2%80%93-discrimination-against-marginalised-groups-ohchr-global-panel/3504361070001) (accessed 20 June 2015).

[76] CERD General Recommendation 31 (2005) paras. 26 (d)) and 38 (a); Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rules 2 and 4 (2) and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 5. See, e.g., HM Inspectorate of Prison, "Muslim prisoners' experience: a thematic review", June 2010 (https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/04/Muslim_prisoners_2010_rps.pdf); and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principles XI, XII.

[77] Irish Penal Reform Trust, "Travellers in the Irish prison system: a qualitative study", 2014. Available from http://www.iprt.ie/files/IPRT_Travellers_Report_web.pdf); and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle II.

[78] Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rule 2 (2).

[79] African Commission on Human and Peoples' Rights, Luanda Guideline 26.

[80] Measures for women offenders (the Bangkok Rules) (2010), rules 54 and 55.

equality before the law. Such punishment could constitute cruel, inhuman or degrading punishment or even torture.

58. International instruments recognize the right of all prisoners to communicate with and receive visits from the outside world, including family, friends and lawyers.[81] As affirmed by the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules): "The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it."[82] These rights may have additional significance for members of minorities, for whom access to outside religious representatives or cultural groups may be as important as access to family and lawyers.[83] Such contact may also be important with respect to the State's obligation to protect and promote the minority identity. The requirement that there be an attempt to place each prisoner in a facility near his or her home takes on particular importance for minority prisoners in the case where a particular minority is geographically concentrated.[84]

59. Prison administrators should ensure they are aware of minorities in the prison population, in order to sensitize and monitor staff interactions and so that prison services are responsive, for instance, as regards the language and themes of books selected for the prison library.[85]

60. Authorities must ensure that each prisoner is informed about and has effective access to complaints procedures regardless of language or any other obstacles arising from his or her minority status.[86]

61. Independent authorities and expert bodies should be mandated to supervise and monitor pretrial and prison facilities, with expertise on discrimination and the situation of minority prisoners and adequate representation of minorities within the body's membership.[87]

62. While all former prisoners face stigma and challenges to successful reintegration within society, minorities may have particular difficulty in this regard. States should have specially adapted reintegration plans for vulnerable groups[88] and ensure that laws that permanently deprive convicted persons of the right to vote do not have a disproportionate impact on minority groups.[89]

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[81] Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rules 58, 61 and 65(3); and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 17, 18 and19, and 28 (regarding the right to obtain "cultural material").

[82] Standard Minimum Rules (revised 2015), rule 88.

[83] Body of Principles, principle 19.

[84] Standard Minimum Rules (revised 2015), pule 59; and Body of Principles, principle 20.

[85] See Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rule 64.

[86] Standard Minimum Rules for the Treatment of Prisoners (revised, 2015), rules 54-57; and Body of Principles, principle 14.

[87] CERD General Recommendation 31 (2005), para. 39; Optional Protocol to the Convention against Torture, article 18 (2); and Subcommittee on the Prevention of Torture, CAT/C/46/2 (2011), para. 107 (j). See, generally, Standard Minimum Rules (revised 2015), rules 83-85; and Body of Principles, principle 29.

[88] CERD/C/CAN/CO/18 (2007), para. 1; and Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rule 90.

[89] CERD General Recommendation XX (48), on article 5 (1996) and Special Rapporteur communication JAL USA 3/2012.

H. Minority victims and witnesses

1. Access to justice for victims

63. Minority victims of crimes are entitled to equal access to justice and reparation; indeed, the special needs of minorities should be taken into account in the provision of victim services and assistance.[90] In practice however, these rights are often not respected or fulfilled.[91]

64. Police may not investigate crimes committed against minorities with the diligence accorded crimes against other victims, whether owing to deliberate discrimination or because more subtle prejudices negatively impact their assessment of the complainants' credibility.[92] This problem can be exacerbated when police officers are accused.[93]

65. Minority victims may be reluctant to report the crime to police,[94] owing to a history of negative experiences with the authorities, lack of faith in the justice system, or lack of knowledge of their rights or lack of practical information such as on where and how to make a complaint. They may fear that bringing themselves to the attention of the authorities will generate more suspicion and result in persecution of themselves, their family or their community. They may have a fear of reprisals from the perpetrators of the crime owing to a lack of confidence that authorities will protect them, pursue the investigation or take the perpetrators into custody. Some may fear deportation, particularly if they do not have recognized legal status in the country.

66. Members of a minority may also view the justice system as a whole as "alien" and to be avoided, particularly if the State has failed to make efforts to guarantee effective participation of the minority by ensuring: that minorities are represented in the police, judiciary, prosecution and legal profession; that law enforcement agencies have an accessible and welcoming physical presence in the community; and that practices and symbols of the justice system are inclusive of the minority.

67. Multiple forms of discrimination which may further curtail access to justice can also arise from within the minority community.[95] Minority women may face multiple stigmas in relation to their ethnic or religious background, their sex, and the nature of the crime of which they were the victim. In India, for instance, Dalit women subjected to violence reportedly face unnecessary delays and pressure to

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[90] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 3 and 17; and OSCE Recommendation 20 on Policing in Multi-Ethnic Societies.

[91] See, e.g., CERD/C/MAR/CO/17-18 (CERD, 2010); CAT/C/SWE/CO/6-7 (CAT, 2014); CERD/C/THA/CO/1-3 (CERD, 2012); CCPR/C/URY/CO/5 (Human Rights Committee, 2013); CERD/C/TCD/CO/16-18 (CERD, 2013); CERD/C/CHL/CO/19-21 (CERD, 2013); CCPR/C/BOL/CO/3 (Human Rights Committee, 2013); and Minority Rights Group International, "No change in sight: the situation of religious minorities in post-Mubarak Egypt", December (2013), pp. 18-19.

[92] See communications received by the Special Rapporteur on minority issues, PAK 14/2014 and IND 4/2014, on allegations of police neglect of minority women.

[93] See, for example, European Court of Human Rights cases condemning lack of investigations in respect of incidents between police and Romas: *Stoica v. Romania* (04.03.2008), *Mizigárová v. Slovakia* (14.12.2010), and *Fedorchenko and Lozenko v. Ukraine* (20.09.2012).

[94] European Union Agency for Fundamental Rights, *EU-MIDIS Data in Focus Report: Minorities as Victims of Crime* (Vienna, 2012).

[95] CERD/C/ECU/CO/20-22 (CERD, 2012), para. 23.

drop charges, which are linked to a combination of their gender and minority status.[96] In some countries of Eastern and Central Europe and Central Asia, parental attitudes can limit minority children's access to justice: girls in particular are expected to remain silent about problematic family situations.[97]

68. Minorities may be at higher risk generally of being victims of ordinary crime, or may need access to justice and reparation particularly in relation to hate crimes motivated by their minority status.[98] Yet, many jurisdictions lack definitions and working protocols for the recording, investigation and prosecution of hate crimes. This leads to the rapid erosion of minorities' trust in justice. Responding effectively to hate crimes can assist in rebuilding trust.

69. States must ensure that members of marginalized minority communities are made aware of their rights as victims and of mechanisms specifically designed to facilitate their access to justice. Targeted assistance programmes for minority victims, dealing with emotional trauma, participation in the criminal justice process, and receiving reparation and rehabilitation, should be developed in cooperation and consultation with the minority community, publicized through minority media and in minority neighbourhoods, and provided in minority languages.[99]

70. Police, prosecutors, judges and lawyers should demonstrate sensitivity and cultural familiarity when questioning or taking testimony from minority victims. For instance, the Special Rapporteur has been a witness to the questioning of a Roma woman who had been sterilized without her consent, and faced serious cultural and religious challenges in explaining her experience to the authorities. The rude response of the authorities imposed additional suffering, thereby deepening the impact of the original violation. The United Nations Office on Drugs and Crime (UNODC) publication entitled "The status and role of prosecutors: a United Nations Office on Drugs and Crime and International Association of Prosecutors guide" recommends that protocols be established to guide prosecutors when dealing personally with those who require special assistance, so as to ensure their full participation in the criminal process.[100]

2. Witnesses

71. Courts must not assign lesser credibility to the testimony of minority witnesses on the basis of prejudices about the minority; owing to differences in appearance, dress, body language or demeanour; or owing to a different use of language which,

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[96] Communication IND 4/2014. See also, regarding women of African descent, A/HRC/27/68 (WGPAD report on access to justice, 2014), para. 59.

[97] UNICEF, *Insights*, issue 1/2014: "Child rights in Central and Eastern Europe and Central Asia: promoting equitable access to justice for all children", p. 10.

[98] European Union Agency for Fundamental Rights, *EU-MIDIS Data in Focus Report: Minorities as Victims of Crime* (Vienna, 2012; and A/HRC/28/64.

[99] United Nations Office for Drug Control and Crime Prevention, "Handbook on Justice for Victims", 1999, p.12 (available from https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf); report of the Independent Expert on Minority Issues, on institutional attention to minorities, A/67/293 (2012), para. 95; and OSCE Recommendation 17 on Policing in Multi-Ethnic Societies. See also, e.g., European Dialogue, Ethnic Minorities and Access to Justice in the Russian Federation, 2006, p. 17.

[100] UNODC, "The status and role of prosecutors: a United Nations Office on Drugs and Crime and International Association of Prosecutors Guide", Criminal Justice Handbook Series, 2014, p. 70.

for example, may be culturally acceptable within the minority culture but may seem unusual or even rude to others.

72. Judges should be equipped — through training, guidance and awareness-raising — to grasp possible explanations for behaviour that might otherwise appear uncooperative. For example, witnesses from certain indigenous or other minority communities might face cultural obstacles to confronting and condemning an accused from the community, particularly an elder or religious leader. Without this contextualization, a court might move swiftly to invoke contempt of court against a witness who refuses to answer in such circumstances, instead of seeking a means of resolving or of at least tackling the witness's culture-related dilemma.

73. Each witness should be free to choose a form of oath that he or she considers appropriate to his or her religion, or to make a secular affirmation.[101]

74. Rules of general application concerning formalities, such as appropriate dress in the courtroom (removal of headwear for instance), may, if applied without exception, be perceived as means of excluding or denigrating minorities, negatively impacting on their participation, cooperation and attitude towards the court.

I. Supporting diversity and non-discrimination

1. Collection of disaggregated data

75. Systematic collection of data disaggregated by ethnic or national, linguistic and religious background (as well as by age and gender) should be the starting point for addressing discrimination and improving participation of minorities in the administration of justice.[102] Such data are crucial for identifying the characteristics and scope of any such discrimination, measuring progress (or regression) and developing effective strategies. Individuals should be allowed to self-identify and privacy should be respected.[103] The information should be collected at each stage of the criminal process. Unfortunately, few States make the required effort.[104]

76. In the United Kingdom and parts of Canada and Spain, police are required to record and issue a receipt to anyone they stop, question or search, indicating the person's ethnic origin (where possible, self-identified), the name of the police

[101] See, e.g., Judicial College, England and Wales, "Discrimination on the basis of belief or non-belief", in Equal Treatment Bench Book, 2013.

[102] See, e.g., Sentencing Project, "Reducing racial disparity in the criminal justice system: a manual for practitioners and policy makers" (2008), p. 28; A/HRC/27/68 (WGPAD report on access to justice, 2014), para 60 (o); CERD/C/FRA/CO/17-19 (CERD, 2010); Committee against Torture General Comment 2, para. 23; CAT/C/NLD/CO/5-6 (Committee against Torture, 2013); A/HRC/24/52/Add.2 (WGPAD mission to Panama, 2013); and A/HRC/29/46 (report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2015).

[103] On privacy and appropriate use of data, see Timo Makkonen, *Measuring Discrimination: Data Collection and EU Equality Law* (Luxembourg, Office for Official Publications of the European Communities, 2006), p. 49.

[104] Almost none of the 25 respondents to the questionnaire declared that they collected any such data. Most either did not answer the question, said no such data were available, or said collection of such data were prohibited. See also A/HRC/24/52/Add.1 (WGPAD visit to the United Kingdom, 2013), paras. 24, 57 and 101; T. Makkonen, *Measuring Discrimination: Data Collection and EU Equality Law*, p. 9.

officer, and the date, location and reason for the action. Such practices should, in principle, be implemented by all law enforcement agencies.[105]

77. Many Governments are reluctant to collect data disaggregated by national origin, ethnicity, religion or language, citing privacy concerns or a history of the abuse of such information for the purpose of targeting minorities for persecution, or they may fear that data could be misused. The Special Rapporteur notes that there are compelling reasons for favouring the collection of disaggregated data.[106] A recent study suggests that many ethnic or racial minorities would like to become visible through data if this would allow authorities to create effective policies for correcting the inequalities in society.[107]

78. Concerns expressed by minorities — who may fear that the data could be used for the purpose of arguing that they commit offences at a higher rate, or that police may prejudicially retain their personal details even when no offence is detected — should be addressed, for instance, through anonymization and time limits for retention of personal data.[108]

2. Recruitment, retention and participation of minorities in the administration of justice

79. Minorities are largely underrepresented in law enforcement agencies, judiciaries, prosecution services and legal professions around the world. Diversity not only reinforces the legitimacy of the criminal justice process, but also ensures that it can draw on the range of experiences of the society as a whole, and contributes to ensuring effective minority participation.[109]

80. In this context, the general prohibition on discrimination in respect of entry into these professions is not sufficient.[110] Actual measurable increase in the recruitment, retention and progression of minorities, including at the most senior levels, is essential.[111] Investment may be required well in advance of formal recruitment processes, for instance, through encouraging and enabling members of

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[105] See European Union Agency for Fundamental Rights, *Towards More Effective Policing: Understanding and Preventing Discriminatory Ethnic Profiling: A Guide* (Luxembourg, Publications Office of the European Union, 2010). See also "Strategies for Effective Police Stop and Search (STEPSS) project (2007-2008)", as detailed in *Addressing Ethnic Profiling by Police: A Report on the Strategies for Effective Police Stop and Search Project* (New York, Open Society Justice Initiative, 2009); and African Commission on Human and Peoples' Rights, Luanda Guideline 3d(iii).

[106] See, for example, Minority Rights Group International, *Disaggregated Data Collection: A Precondition for Effective Protection of Minorities in Southeast Europe* (London, 2006). Briefing author: Kathryn Ramsay.

[107] See Open Society Foundation, Equality Data Initiative, "Ethnic origin and disability data collection in Europe: measuring inequality — combating discrimination" (Brussels, November 2014), p. 59.

[108] See, e.g., New York State Assembly law A.11177-A/S.7945-A (2010).

[109] OSCE Recommendations on Policing in Multi-Ethnic Societies, recommendation 4.

[110] Basic Principles on the Independence of the Judiciary, principle 10; Basic Principles on the Role of Lawyers, principle 10; and Guidelines on the Role of Prosecutors, guideline 2 (a).

[111] E/CN.4/Sub.2/2005/7, para. 52; CERD General Recommendation 31 (2005) para. 5 (d); Committee against Torture General Comment 2, para. 24; United Nations human rights experts, "'Legitimate concerns' over outcome of Michael Brown and Eric Garner cases", OHCHR press release, 5 December 2014; and OSCE Recommendations on Policing, recommendation 5.

minorities to study in order to acquire the necessary academic or professional qualifications.[112]

81. Recruitment policies that take no formal account of national or ethnic origin, or religious or linguistic background, have tended to result in underrepresentation of minorities in law enforcement institutions. Affirmative action or temporary special measures may therefore be necessary, including at the most senior levels.[113] India has, for example, been implementing a "15-point Programme for the Welfare of Minorities" over nearly a decade, focusing on special consideration for minorities in respect of their recruitment into State and central government police forces, as well as on ensuring that the composition of selection committees are representative of disadvantaged minorities.[114]

82. Retention and vertical mobility for minority representatives are as important as initial recruitment.[115] Among the reasons given by minority police officers for resigning from their post are difficulties inherent in integrating into the occupational culture, frustration at the way in which supervisors dealt with daily racist banter, and aggressive policing of ethnic minorities.[116] While Governments, including senior police officials, have a duty to stop such behaviour, peer-to-peer support can also play an important role. In Hungary and the United Kingdom of Great Britain and Northern Ireland, for instance, police officers from minority backgrounds have organized support networks for themselves and their colleagues.[117]

83. Participation of minorities in designing laws and policies and advising on procedures is important to ensure that these laws, policies and procedures are vetted for any disproportionate impact on minorities. This implies better representation of minorities within all branches of government and a greater degree of consultation with the relevant communities.

3. Training

84. Non-discrimination and promotion of cultural diversity should be part of the professional training of all staff within the criminal justice system.[118]

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[112] In Hungary, police scholarship and summer camps were introduced for Romani secondary school students. (A/HRC/10/38/Add.1 (2009) p. 9). Serbia reports that its police agencies advertise in national minority languages to encourage applications, and make certain that written tests available in national minority languages (response to questionnaire).

[113] Basic Principles on the Role of Lawyers, principle 11; A/HRC/27/68 (WGPAD report on access to justice, 2014), para. 60 (o); A/HRC/24/52/Add.1 (WGPAD, visit to the United Kingdom, 2013), para. 66; OSCE Recommendation on Policing No. 6; and;. Human Rights Committee, General Comment No. 18 (1989), para. 10. See also Wouter Vandenhole, *Non-Discrimination and Equality in the view of the UN Human Rights Treaty Bodies* (Cambridge, United Kingdom, Intersentia, 2005), p. 188.

[114] See http://www.minorityaffairs.gov.in/pm15point.

[115] OSCE Recommendations on Policing in Multi-Ethnic Societies, recommendation 7.

[116] See, e.g., Simon Holdaway and Anne-Marie Barron, *Resigners? The Experiences of Black and Asian Police Officers* (Basingstoke, United Kingdom, Palgrave Macmillan, 1997).

[117] E.g., United Kingdom, Gypsy, Roma and Travellers Association (http://www.grtpa.com/); National Black Police Association (http://www.nbpa.co.uk/); and Hungary, Fraternal Association of Roma Law Enforcement Officers (http://www.faerleo.com/).

[118] CERD/C/MLT/CO/15-20 (CERD, 2011), para. 11; CERD/C/SVK/CO/9-10 (CERD, 2013), para. 7; CERD/C/ECU/CO/20-22 (CERD, 2012); and Principles and Guidelines on Fair Trial and Legal Assistance in Africa, 2003, part B (c).

85. Minorities should be involved in the training process, including in developing and delivering training modules. Whenever possible, training should be continuous and should target senior staff first, so as to ensure provision of leadership.[119]

86. Appropriate educational programmes for law enforcement, justice system and prison staff should include material on respect for human rights, tolerance and friendship among racial, ethnic or religious groups, as well as sensitization to intercultural relations[120] and the elimination of discriminatory behaviour (including informal profiling).[121]

87. Promoting good inter-ethnic and interreligious relations should be required in every police code of conduct, and should be the subject of specific training for senior as well as junior police officers, to be included in both initial and in-service training. Law enforcement officials need to be trained to recognize and respond appropriately to the sensitivities of particular minorities.[122] For example, the Russian police worked together with representatives of ethnic minorities to develop police training modules covering the cultural and religious backgrounds of minority communities.[123]

88. Guidance and training concerning the risks of misperception and prejudice when dealing with defendants and witnesses from minorities should be made available to judges and magistrates.[124] The National Center for State Courts of the United States of America, for instance, has prepared training materials for judges on self-identifying and avoiding implicit bias.[125]

IV. Conclusions and recommendations

89. **Globally, minorities face discrimination and lack of representation within the administration of criminal justice. Measures to eliminate discrimination and ensure equality before the law are more likely to be effective if undertaken with a minority rights-based approach, which includes ensuring effective participation of minorities in all aspects of the criminal justice process and administration of justice.**

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[119] Pamela M. Casey and others, "Helping courts address implicit bias: resources for education" (National Center for State Courts, 2012) ; and OSCE Recommendation 11 on Policing in Multi-Ethnic Societies.

[120] CERD General Recommendation 31 (2005) para. 5 (b). E.g., American Bar Association, "Building community trust: improving cross-cultural communication in the criminal justice system", 2009. See also Principles on Persons Deprived of Liberty in the Americas (2008), principle XX.

[121] A/HRC/24/52/Add.2 (WGPAD, visit to Panama, 2013), para. 105 (p); A/HRC/29/46 (Human Rights Council, 2015), paras. 71-72; and CERD/C/GEO/CO/4-5 (CERD, 2011).

[122] OSCE Recommendations 10 and 9 on Policing in Multi-Ethnic Societies (2006).

[123] European Dialogue, Project on Ethnic Minorities and Access to Justice in the Russian Federation, 2006 (available fromhttp://www.europeandialogue.org/reports/emaj_eng.pdf) (accessed 20 June 2015).

[124] Roger Hood, Stephen Shute, and Florence Seemungal, "Ethnic minorities in the criminal court: perception of fairness and equality of treatment", Project report (London, Lord Chancellor's Department, 2003).

[125] See Casey and others, "Helping Courts address implicit bias: resources for education" (Williamsburg, Virginia, National Center for State Courts, 2012).(www.ncsc.org/ibreport). See also the Benchbooks of the United Kingdom and Australia cited above; and Human Rights Council resolution 29/6 (2015), paras. 6 and 9.

90. **Members of a minority are less likely to engage with, or participate as actors within, criminal justice institutions as long as the members of that minority face active discrimination within the system, whether as accused, victims or witnesses. This being the case, non-minority officials and representatives must also act on their own initiative to address discrimination in the administration of justice, and to transform negative feedback cycles of distrust into positive feedback cycles of progress.**

91. **The Organization for Security and Cooperation in Europe (OSCE) recommendations on policing in multi-ethnic societies, which provide detailed guidance on making police services more representative and enhancing communication between police and minority communities, should be regarded by all States as a useful framework, relevant as well for national or ethnic, religious and linguistic minorities.**

92. **Sources cited throughout this report provide States with many practical recommendations on how to improve the situation of minorities in the criminal justice system. Space considerations permit the Special Rapporteur to highlight only a few:**

Collection and analysis of disaggregated data

93. **States should collect comprehensive and disaggregated data with regard to the involvement of persons belonging to national or ethnic, religious and linguistic minorities in all aspects of the criminal justice system. Anonymous statistics should be accessible for analysis by government, academic, civil society and regional and international organizations, for the purpose of enabling them to design measures for eliminating discrimination and increasing effective participation in the entire administration of justice. Data should be collected on the basis of individual self-identification and consent (wherever possible) and use should respect the need for personal data and privacy protection, including through anonymization and time limits on retention.**

Access to justice for minority victims

94. **States should ensure that members of minorities are proactively informed, in a language and through a means appropriate to their situation, of their rights as victims of crime, and on how to access support, including legal assistance and interpretation services. To this end, States should consider establishing liaison officers from, or with connections in, the relevant minority communities.**

95. **Police, prosecutors and judicial authorities must ensure that criminal complaints from members of minorities are pursued with the same diligence that is applied to those of other complainants. Where necessary, special measures and accommodations in investigation and trial procedures should be adopted, in consultation with minority communities. All police should have protocols and training in respect of recording and investigating hate crimes.**

Minorities and policing

96. **States should ensure that individuals are not selected for identity checks, questioning, stops and searches, surveillance or other policing measures solely**

or primarily on the basis of their membership in a minority. Use by the police of their power to conduct identity checks or to stop and search individuals should be based on the requirement of individualized suspicion; and the use of broader preventive powers should be strictly circumscribed. Police should be required to record the reason for stopping, questioning or searching any person and to provide the person with a copy of the record.

97. **States should ensure that rules for use of force by police respect the principles of necessity and proportionality, and that intentional use of lethal force is restricted to situations where it is strictly unavoidable in order to save life. Discriminatory patterns of use of excessive or otherwise unlawful force should be independently and impartially investigated and the results should be publicized.**

98. **States should establish mechanisms, policies and practices for community-oriented policing which bring together police agencies and minorities to participate in the administration of justice, and to foster trust, dialogue and partnership.**

Rights in pre-detention and prison

99. **States should assess whether minorities are disproportionately represented in pretrial detention or prison, and take concrete measures to address the root causes.**

100. **Conditions of detention or imprisonment, and the relevant staff, should reasonably accommodate the cultural, dietary, religious and linguistic characteristics of minority prisoners.**

101. **Places of detention should be subject to unannounced visits by independent bodies which include adequate representation of minorities.**

Judicial procedures and sentencing

102. **States should ensure that minority accused receive legal assistance, including free-of-charge assistance where necessary, without discrimination.**

103. **States should ensure free professional translation for minority accused who are not fluent in the language used in court, and should allow those persons to use the minority language. States should further consider recognizing the right of members of minorities with significant population or historical ties, whether nationally or locally, to have the proceedings conducted in their own language.**

104. **Independent professional associations for judges, prosecutors and lawyers should provide guidance and training, including with respect to implicit bias and indirect discrimination; and there should be disciplinary consequences and remedial measures when discrimination against minorities is practised.**

105. **Discrimination against minorities in jury selection procedures should be explicitly prohibited.**

106. **States should ascertain whether minorities are subjected to harsher penalties in sentencing or execution of sentence, identify any role that direct or indirect discrimination plays in this regard, and take measures to eliminate it.**

Systematic reform of laws, policies and practices

107. **In collaboration with representatives of minorities, Governments should elaborate and adopt a national strategy designed to prevent discrimination against minorities within the criminal justice system and to increase the effective participation of minorities within the system.**

108. **Police forces should collaborate with minorities at the local level in establishing permanent liaison mechanisms that are controlled or jointly controlled by the minorities themselves, developing local strategies, keeping open the lines of communication and building mutual trust.**

Representation and participation of minorities in the administration of justice

109. **States should ensure the recruitment, retention and promotion of members of underrepresented minorities in the police, the judiciary, prosecution services, the legal profession and prison staff, including through specially targeted measures developed in consultation with minority groups and existing minority staff.**

110. **The Office of the United Nations High Commissioner for Human Rights should consider producing guidelines on integration with diversity in policing, thereby resuming the process initiated under the former Working Group on Minorities.**

Training

111. **All staff working in the criminal justice system should receive training, conducted with the participation of minorities, in non-discrimination and cultural competency.**

Oversight mechanism and accountability

112. **National human rights institutions should consider establishing a specific mechanism dedicated to addressing the rights of minorities, including within the criminal justice system.**

113. **National institutions responsible for oversight of police, as well as independent regulatory bodies for the judiciary, prosecutors and legal profession, should systematically assess and report on the situation of minorities within the criminal justice process, and take action when they observe discrimination.**

Annex

Countries that replied to the questionnaire

Albania, Argentina, Azerbaijan, Bahrain, Bulgaria, Colombia, Finland, Georgia, Hungary, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Lebanon, Lithuania, Madagascar, Malta, Mexico, Morocco, Paraguay, Serbia, Slovakia, Spain, Syrian Arab Republic Togo, Tunisia and Venezuela (Bolivarian Republic of).